UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. TELE-COMMUNICATIONS, INC. and LIBERTY MEDIA CORPORATION Defendants.	)	Civil Action No.

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2 (b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16 (b) - (h), the United States submits this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry with the consent of Tele-Communications, Inc. and Liberty Media Corp. in this civil antitrust proceeding.

I.
NATURE AND PURPOSE OF THE PROCEEDING

On April 28, 1994, the United States filed a civil antitrust complaint, under Section 15 of the Clayton Act, as amended, 15 U.S.C. § 25, against Tele-Communications, Inc. ("TCI") and Liberty Media Corporation ("Liberty") (collectively "Defendants"), alleging that the proposed merger of Defendants violates Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

TCI is the largest cable multiple systems operator ("MSO") in the United States in terms of subscribers, and Liberty is one of the largest MSOs. Pursuant to an agreement dated January 27, 1994, TCI and Liberty agreed to merge. Combined, TCI and Liberty would have financial interests in cable systems accounting for more than 13 million subscribers, or approximately one-fourth of the nation's cable subscribers. The combined firms would also have substantial financial interests in a large number of providers of video programming to multichannel subscription television distributors. The Complaint alleges that the effect of such combination may be substantially to lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, by:

1. Decreasing actual and potential competition among video programming providers, because the combined TCI-Liberty may have the increased ability and incentive to discriminate with respect to access to its cable systems, or the terms and conditions of such access, in favor of its affiliated video programming providers and against unaffiliated video programming providers.

2. Decreasing actual and potential competition among multichannel subscription television distributors, because the combined TCI-Liberty may have the increased ability and incentive to deny to competing multichannel subscription television distributors access to its affiliated video programming services, or to provide such access only on unreasonable terms.

On April 28, 1994, the United States and Defendants filed a Stipulation by which they consented to the entry of a proposed Final Judgment designed to eliminate the anticompetitive effects of the proposed merger. The proposed Final Judgment, as explained more fully below, would enjoin Defendants from discriminating against unaffiliated video programmers with respect to access to its cable systems and other multichannel subscription television distributors ("MSTDs"), and from discriminating against other MSTDs with respect to its programming providers, where such discrimination results in an unreasonable restraint on competition.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment will terminate this action, except that the Court will retain jurisdiction to construe, modify and enforce the Final Judgment, and to punish violations of the Final Judgment.

II.
EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. *Description of the Parties and the Proposed Transaction*

TCI is the largest cable multiple systems operator ("MSO") in the United States, with financial and management interests in cable systems serving more than 10.2 million subscribers. TCI also has substantial interests in direct-to-home satellite delivery of multichannel subscription television service, with both a substantial C-band satellite business and a partnership interest in Primestar Partners, L.P., a Ku-band satellite multichannel subscription television service. TCI also has financial and management interests in programming services such as The Discovery Channel, The Learning Channel, E! Entertainment Television, Request Television (pay-per-view), Home Shopping Network Inc., QVC Network Inc., Starz, Rocky Mountain Prime Sports Network, and Turner Broadcasting Systems, Inc. (which provides Cable News Network (CNN), Headline News, The Cartoon Network, TBS and Turner Network Television (TNT)).

Liberty is a large cable MSO, with financial and management interests in cable systems serving 2.9 million subscribers. Liberty also has financial and management interests in a wide range of programming services, including Black Entertainment Television (BET), The Box, Courtroom Television Network, Encore, Starz, Family Channel, Home Shopping Network Inc., QVC Network Inc., Prime Sports Network and more than a dozen regional sports channels.

TCI and Liberty intend to merge pursuant to an agreement dated January 27, 1994. Together TCI and Liberty will serve more than 13 million subscribers, or about a quarter of the nation's cable subscribers, and have financial interests in a wide range of programming services, including a number of the most popular and widely-carried services.

B. *Historical Relationship Between TCI and Liberty*

In 1990, TCI created Liberty, a new public company, through a rights offering to TCI shareholders and moved certain TCI assets into Liberty. According to TCI, the new company was created for two reasons. First, the company anticipated that possible federal legislation or regulation might force such divestiture later under unfavorable circumstances; a voluntary separation allowed TCI to retain ties to the new company. Second, in a smaller company, management would be able to devote greater attention to maximizing the value of Liberty assets and have greater freedom to pursue growth opportunities in the cable industry. TCI management also felt that capital and financial markets had not given appropriate recognition to certain TCI interests and assets, particularly in the cable programming area, because they were difficult for security analysts and others to identify, value and track; TCI hoped that, in a smaller company, the actual and potential value of those interests and assets would be appropriately recognized.

Although Liberty was organized as a separate company, it shared stockholders and directors with TCI. Five shareholders maintained voting control of both firms, and Bob Magness has simultaneously served as Chairman of the Board of TCI and a director of Liberty, and John Malone has simultaneously served as President, Chief Executive Officer, and a director of TCI and Chairman of the Board of Liberty. TCI acknowledges that the two companies have cooperated closely since Liberty was formed, and are partners in a number of ventures.

In 1992, Congress passed the Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"), which, combined with implementing FCC regulation, established a legal framework regarding, among other things, the number of cable subscribers a person is authorized to reach through cable systems owned by such person, or in which such person has an attributable interest, and delineating the extent to which multichannel video programming distributors may engage in the creation or production of video programming. TCI claims that the cable system and programming assets of TCI and Liberty can be recombined under this regulatory framework, and that appropriate market valuation for Liberty's assets has been achieved, thus obviating the principal reasons for separating the companies. According to TCI the recombination will eliminate certain inefficiencies and costs of separation, as well as eliminate confusion and conflicts that may have resulted from the separation.

While not indifferent to the cooperative relationship between the firms and the commonality of control in five shareholders and common managers and directors, the Department has analyzed the proposed merger as a transaction involving two separate entities, since separate legal and fiduciary obligations exist for each of the firms that require each firm to operate in its distinct interest.

C. Effects on Competition

A multichannel subscription television distributor ("MSTD") is an entity that provides multiple channels of video programming to consumers on a subscription or fee basis, as differentiated from local broadcast television stations which individually provide a single channel at no charge within their broadcast areas. MSTDs deliver programming to consumers utilizing various methods, including cable, multichannel multipoint distribution ("MMDS"), satellite master antenna television ("SMATV"), direct-to-home satellite, or the facilities of common carrier telephone companies or their affiliates.

The United States filed its complaint because the effects of the proposed merger may be substantially to lessen competition (i) among providers of video programming to MSTDs in the United States, and (ii) among MSTDs in the areas in the United States in which TCI and Liberty control cable systems[1]. The merger of TCI

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[1] These product and geographic markets are appropriate

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and Liberty would result in a vertically integrated firm with (1) substantial interests in widely distributed and popular video programming and (2)control of approximately one-quarter of the nation's cable subscribers. Accordingly, the merged firm may have both the ability and incentive to lessen competition by discriminating against non-affiliated programmers in terms of access to its MSTDs and by denying to competing MSTDs access to its video programming on reasonable terms.

The market for multichannel subscription television distribution today is overwhelmingly dominated by local cable systems. Cable television service is available in nearly all urban and suburban areas in the United States as well as many rural areas, passing more than 95% of the nation's estimated 92 million television households. Cable television systems currently serve more than 55 million subscribers in more than 11,300 cable systems located in all 50 states, or about 60% of households passed. Nearly all communities are served by a single cable system; fewer than 0.5% of the more than 10,000 cable franchise areas have more than one cable system available to local cable subscribers. Today, cable television systems face very limited competition from other types of distribution systems, including MMDS, SMATV, and direct-to-home satellite, and may face competition in the future from video dialtone services.

MMDS delivers programming over microwave channels received by subscribers with special antennae. There are currently fewer than 150 MMDS systems in operation, serving an estimated 600,000 subscribers. MMDS has recently obtained regulatory approval to deploy systems that are considered technologically superior,

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markets in which to assess the possible competitive effects of this proposed merger. Whether or not these markets will be appropriate markets in which to analyze other transactions or conduct within the industry will, of course, depend on the particular circumstances presented in each individual case.

which may increase its availability and attractiveness as an alternative to cable television service.

SMATV is essentially a private cable system, typically used in apartment buildings or other high-density housing. SMATV is estimated to have fewer than 1 million subscribers.

Home satellite dishes are used to receive programming from communications satellites. More than two and one-half million satellite dishes have been sold in the United States. C-band satellite service, which is provided by low-power satellites, requires consumers to install satellite receiving dishes eight to twelve feet in diameter at an installed cost of $1,500 or more. Because of its high installed cost and the size of the receiving dish required, C-band satellite is a poor alternative to cable television service for most current or potential cable subscribers. Medium-power Ku-band satellite service, provided by TCI and its partners in a joint venture called Primestar Partners, L.P., uses dishes three feet in diameter and has approximately 70,000 subscribers. High-power DBS is expected to become operational and available within a few months using a dish 18 inches in diameter, and may by virtue of its smaller dish size be more attractive to consumers so that it ultimately may offer greater competition to cable service than the other satellite services.

Video dialtone is a multichannel subscription television service recently authorized by Federal Communications Commission regulation and being developed by common carrier telephone companies. Using the telephone network, telephone companies plan to offer distribution of programming provided by third parties. As the telephone companies improve the capabilities and capacity of their networks, they are expected to be able to offer greatly expanded channel capacity and services such as "video-on-demand." At present, there are a small number of pilot projects demonstrating the service. Widespread development of video dialtone services in the future may present a substantial competitor to cable systems. Common carrier telephone companies also have announced their interest in providing cable service directly to subscribers in the event that legal restrictions on their offering such services within their operating regions are removed.

As discussed above, both TCI and Liberty, in addition to operating cable systems, each have substantial financial interests in video programming services provided to cable systems and other MSTDs. The merger of TCI and Liberty creates a vertically integrated firm with substantial power both as a MSTD and as a video programming provider. TCI and Liberty together will effectively control access to about one-fourth of cable subscribers and will be affiliated with eight of the twenty most widely distributed cable programming services. This substantial integration is likely to increase abilities and incentives to restrain competition in two ways. First, the merged firm could discriminate against competitive video programmers in favor of its affiliated programmers by refusing to carry programs or by denying similar terms or conditions thereby making it significantly more difficult for such competitive programmers to operate profitably or to compete effectively against the merged firm's programming services. Second, the merged firm could deny access to or discriminate in terms of access to its programming to competing MSTDs, making it more difficult for competitive distribution systems to obtain programming necessary to compete effectively against the merged firm's MSTDs.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The United States and the defendants have stipulated that the Court may enter the proposed Final Judgment after compliance with the APPA. The stipulation provides that entry of the Final Judgment does not constitute any evidence or admission by any party with respect to any issue of fact or law. Under the provisions of the APPA, the proposed Final Judgment may not be entered unless the Court finds that entry is in the public interest. The Department believes that the proposed Final Judgment provides an adequate remedy for the alleged violation and is in the public interest. The term of the proposed Final Judgment is five (5) years. The length of this term reflects the Department's recognition that this industry is one that has experienced major changes in MSTD technologies that are on-going, and the effects of the 1992 Cable Act and its implementing FCC regulations.

Section IV(A) of the proposed Final Judgment enjoins Defendants' cable systems and other MSTDs from discriminating against non-affiliated video programmers in the selection, terms, or conditions, where the effect of such conduct is unreasonably to restrain competition. This provision does not create an automatic right of access for any individual video programmer to any of Defendants' individual MSTDs, nor is it intended to inhibit good faith negotiations between Defendants and unaffiliated programmers regarding the terms and conditions of carriage. However, where the effect of discrimination by Defendants is to restrain competition, such conduct is prohibited. Discriminatory conduct can take a variety of forms depending on individual circumstances, and may include, but is not limited to, discrimination in: (i) pricing; (ii) channel assignment; (iii) tiering or packaging of programming services; (iv) promotional activities; and (v) signal quality.

By Section IV(B), Defendants are enjoined from refusing to sell or license, or from selling or licensing only on a discriminatory basis, video programming in which they have an interest to any competing MSTD, where the effect of such conduct is unreasonably to restrain competition. Differences in price or terms that are reasonably based on ordinary commercial factors, including but not limited to the factors currently set forth in 47 C.F.R. § 76.1002(b), will not constitute prohibited discrimination. This section therefore does not prevent defendants from engaging in good faith business negotiations or from imposing reasonable requirements for the creditworthiness or service quality of a distributor, or from establishing prices, terms, and conditions that reasonably reflect actual differences in the distributor's costs of providing such video programming or economies of scale or other economic benefits reasonably attributable to the number of subscribers served by such distributor. This provision does assure that Defendants may not refuse to license their video programming to competing MSTDs where the effect would be to inhibit the ability of such MSTDs to compete against Defendants.

Section IV (C) extends the prohibitions set forth in Sections IV(A) and (B) to prevent Defendants from seeking or supporting, with respect to any MSTD or video programming provider in which Defendants have any financial interest but do not control, conduct that would violate Sections IV (A) or (B) if engaged in by Defendants. For example, should Defendants urge Turner Broadcasting, Inc. to deny programming to a competing MSTD under circumstances that would result in an unreasonable restraint on competition, such conduct by Defendants would violate this section.

By prohibiting conduct by Defendants that might restrain competition in the provision of video programming or multichannel subscription television distribution, the Department believes that the anticompetitive effects of the proposed merger alleged in the Complaint will be fully remedied. In addition, by expressly including common carrier telephone companies and their video dialtone customers in the definition of MSTDs, the proposed Final Judgment will make clear the defendants' obligation to refrain from anticompetitive discrimination against these potential competitors. The Department's view as to the sufficiency of this relief also rests on the existence of Sections 12 and 19 of the 1992 Cable Act, and their implementing FCC regulations, as well as the judgments recently entered in

U.S. v. Primestar Partners, L.P., et. al.[2] and *State of New York, et. al. v. Primestar Partners, L.P, et. al.*[3] ("Primestar cases").

IV.
REMEDIES AVAILABLE TO POTENTIAL LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust actions under the Clayton Act. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no *prima facie* effect in any private lawsuit that may be brought against the defendants.

V.
PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

As provided by the APPA, any person believing that the proposed Final Judgment should be modified may submit written comments within the sixty (60) day period from the date of publication in the *Federal Register* to Richard L. Rosen, Chief, Communications and Finance Section, Antitrust Division, U.S. Department of Justice, 555 Fourth Street, N.W. Room 8104, Washington, D.C. 20001. These comments, and the Department's responses, will be filed with the Court and published in the *Federal Register.* All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent at any time prior to entry. The proposed Final Judgment

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[2] No. 93 Civ. 3913 (S.D.N.Y. April 4, 1994).

[3] 1993-2 Trade Cas. (CCH) ¶¶ 70,403-4 (S.D.N.Y. Sept. 14, 1993).

provides that the Court retains jurisdiction over these actions, and any party may apply to the Court for any order necessary or appropriate for their modification, interpretation or enforcement.

VI.
ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, litigation to enjoin the merger. The United States rejected that alternative because the relief in the proposed Final Judgment should prevent the possible occurrence of conduct the effect of which may be substantially to lessen competition in the provision of video programming to MSTDs in the United States or competition among MSTDs in the geographic areas in which Defendants have cable systems. Moreover, the terms of the proposed Final Judgment are supplemented by the provisions of the 1992 Cable Act and its implementing FCC regulations, as well as the judgments in the Primestar cases. Under these circumstances, seeking to enjoin the merger would only prevent the two firms from achieving the economic efficiencies that may result from vertical integration and, given their history and present circumstances, eliminating the costs imposed by their legal separation into separate firms.

VII.

DETERMINATIVE DOCUMENTS

No documents were determinative in the formulation of the proposed Final Judgment. Consequently, the United States has not attached any such documents to the proposed Final Judgment.

Dated:

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